

The Transformation of American Law, 1780-1860

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monwealthmen were caught somewhere in between. The new radicals were less concerned with the universal, more insular, and more democratic. Thomas Paine supplanted John Locke as the radical Moses. The implications for property and moderation appalled the old radicals who now looked to America more fervently than ever as the counterbalance to terror and the levelling-down of society. France cannot save England, they insisted. England must be saved in America.

What might have been a fatal split within radicalism did not happen. First of all, Commonwealthmen, such as Cartwright, adapted their thinking to conclude that broader representation which would include the "lower orders" was not to be feared after all. Again, the American experience was used as the lodestar. In that country's fifteen state assemblies, "representation based on personalty instead of property did not lead to anarchy, but was, if correctly understood, 'the most complete specific against that popular phrenzy.' " (p. 240). Secondly, the new radicals came to acknowledge the example of America, and their debt to it, as a bastion of egalitarianism. Even Jeremy Bentham, who had once "ridiculed the natural rights philosophy of the Declaration of Independence, came to see the United States as a successful example of the democratic ideal in operation." (p. 241). Thus, old radicalism became the rootstock upon which the new radicalism was grafted for growth in the nineteenth century.

Professor Bonwick's sources are extensive and helpful. His style is lucid, carrying the reader along through the maturation process of radical ideas in England against the backdrop of the American and French Revolutions. He builds on where Caroline Robbins left off, at 1789, but he only whets the appetite of the reader for details of the old and new radical synthesis; he does not satisfy it. Perhaps he plans a second volume. It would be appreciated.

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The Transformation of American Law, 1780-1860, by Morton J. Horwitz.
Cambridge, Mass.: Harvard University Press, 1977. pp. xi, 345. \$16.50.

Horwitz's book is an important contribution to the literature on nineteenth century American law. It is also a nice complement to it for, as Horwitz observes, historians have overemphasized constitutional law and its impact on American economic development. To correct this imbalance Horwitz has undertaken a careful study of private law—torts, contracts, property and commercial law—which became the major vehicle utilized by merchant entrepreneurial groups to stimulate economic development and to secure for themselves a disproportionate share of the benefits of such development. By 1860, private law was, as Horwitz sees it, as different from its eighteenth cen-

ture predecessors, as the newly modeled society which resulted from the changes in the law.

The changes in American law Horwitz analyzes occurred gradually over a seventy or eighty year period. For example, before 1780 common law was conceived as an eternal set of principles derived from natural law. These principles were in practice anticommercial and antidevelopmental. During the late eighteenth and early nineteenth centuries, this older concept was replaced with one that not only responded "to new market forces," but encouraged these forces and the consequent social change. These changes in law tended to subsidize development by minimizing risk capital's responsibility in law. In the 1830's courts modified common law standards of strict liability to include a requirement of negligence. In practice this meant that railroads, for example, would not be responsible for fires set by the sparks of their locomotives as they would under common law. This, in effect, constituted a subsidy to developers through the presumably apolitical legal system, a subsidy with which the burden was placed on less politically powerful groups.

As these changes occurred, their primary beneficiaries formed an alliance with an earlier antagonist—lawyers. As this alliance solidified, lawyers enshrouded the newly modeled law behind the cloak of an allegedly neutral formalism. With the acceptance of the formalism the transformation of American law was complete.

Horwitz's book is complex and its goals ambitious. There lies its major weakness. As he notes at the outset, the materials presented are technical and often difficult for the layman to understand. While it is true that Horwitz tries to clarify the intricacies of law and to make the material somewhat more accessible, it seems he unnecessarily uses Latin phrases presumably understood by lawyers and puts the translations in a footnote at the back of the book. If the phrases have to be translated (and they do), he should put the translation in the text.

More importantly, Horwitz traces a transformation in law, but he does not adequately explain why that transformation occurred. Nor does he prove that the change in law had the social consequences he alleges. This was, of course, not his primary purpose. But he argues throughout that the law underwent crucial changes beginning in 1780. He attributes that change to the shifting perceptions of various judges as to the role of law in fostering social and economic change. Although it is not always clear why their perceptions changed.

Similarly Horwitz repeatedly alludes to the impact of the law in fostering economic maldistribution. But nowhere does he demonstrate the actual impact of the law. What are the costs of subsidizing development through the legal as opposed to the tax system? How does this foster greater inequality? Although such questions remain unanswered, *The Transformation of American Law* is indispensable reading for those who wish to understand nineteenth century American society as it underwent a transformation, perhaps as a result of the transformation of private law as Horwitz ably describes.

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